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No. 88-179

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In The

**Supreme Court of the United States**

**October Term, 1988**

JONATHAN CLUB,

*Appellant,*

v.

CALIFORNIA COASTAL COMMISSION,

*Appellee.*

**On Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District**

**MOTION OF APPELLEE CALIFORNIA COASTAL  
COMMISSION TO DISMISS OR AFFIRM**

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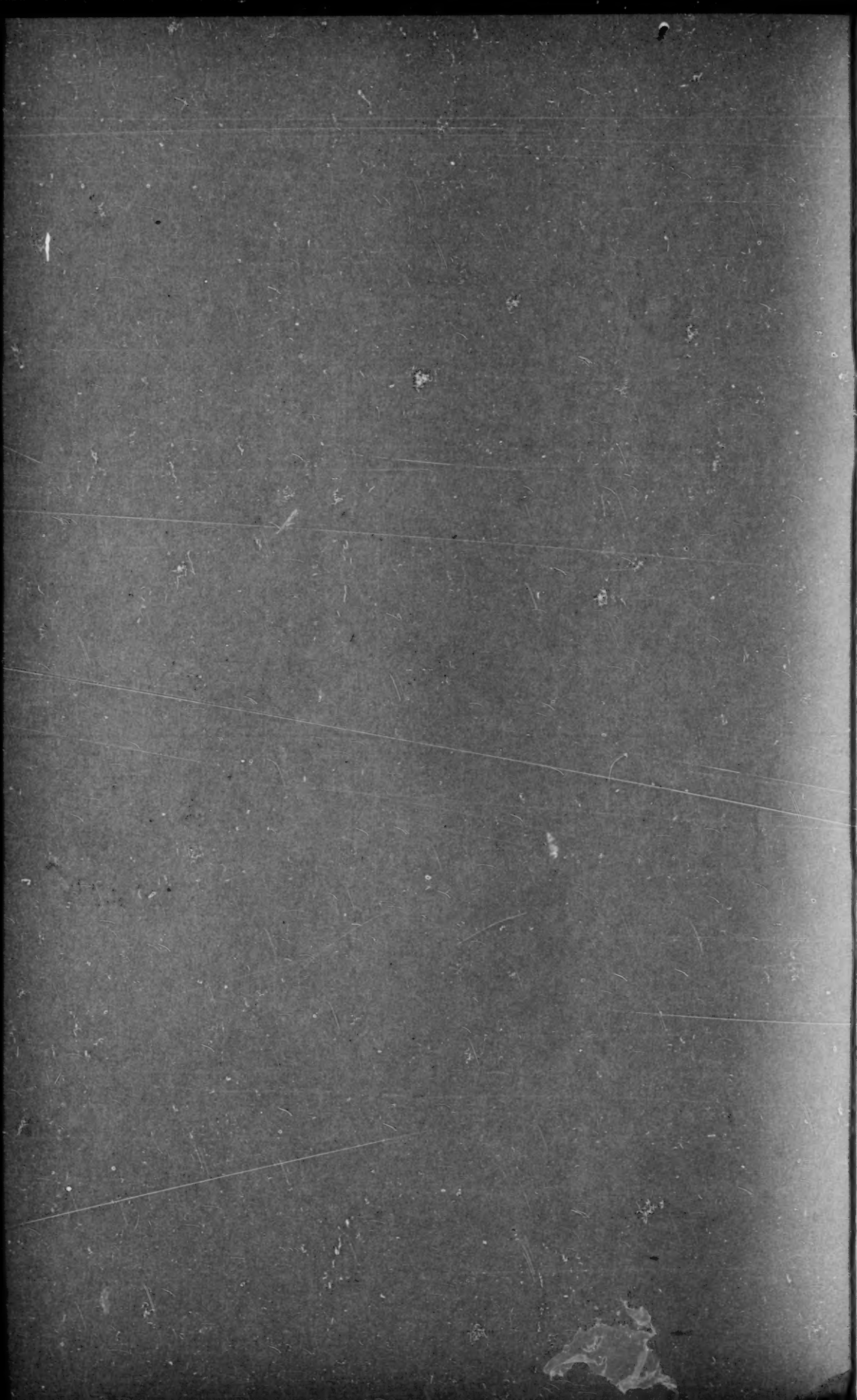
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## TABLE OF CONTENTS

|  | Page |
|--|------|
| MOTION OF APPELLEE CALIFORNIA COASTAL<br>COMMISSION TO DISMISS OR AFFIRM .....                                     | 1    |
| STATEMENT OF THE CASE.....   | 2    |
| STATEMENT OF FACTS.....  | 3    |
| ARGUMENT .....   | 4    |
| I THE DECISION OF THE COURT BELOW<br>RESTS UPON AN INDEPENDENT STATE<br>GROUND.....                                | 4    |
| II THE QUESTIONS PRESENTED ARE NOT<br>SUBSTANTIAL AND DO NOT WARRANT<br>FURTHER ARGUMENT BEFORE THIS<br>COURT..... | 6    |
| A. The "State Action" Issue Was Decided On<br>The Basis Of Well-Established Law.....                               | 6    |
| B. The "Freedom Of Association" Issue<br>Breaks No New Ground.....   | 8    |
| C. There Is No Substantial Issue Of Due Pro-<br>cess .....   | 8    |
| III THE JONATHAN CLUB IS NOT ENTITLED TO<br>RAISE ISSUES WHICH WERE NOT PRE-<br>SENTED BELOW.....                  | 10   |
| CONCLUSION .....   | 12   |

# TABLE OF AUTHORITIES

Page

## CASES

|   |      |
|---|------|
| Board of Directors of Rotary International v.<br>Rotary Club of Duarte (May 4, 1987) ___ U.S.<br>___, 107 S.Ct. 1940..... | 2, 8 |
| Burton v. Wilmington Parking Authority (1961)<br>365 U.S. 715.....  | 2, 6 |
| Cardinale v. Louisiana (1969) 394 U.S. 437, 438.....  | 10   |
| Gilmore v. City of Montgomery (1974) 417 U.S.<br>556.....   | 2, 6 |
| Golden v. Biscayne Bay Yacht Club (5th Cir. 1976)<br>530 F.2d 16, cert. denied, (1976) 429 U.S. 872.....                  | 7    |
| Lynch v. New York (1934) 293 U.S. 52, 54.....   | 10   |
| Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163 ..   | 2, 6 |
| New York State Club Assn., Inc. v. City of New<br>York (June 20, 1988) ___ U.S. ___, 56 U.S.L.W.<br>4653.....             | 2, 8 |
| Roberts v. United States Jaycees (1984) 468 U.S.<br>609.....  | 2, 8 |
| Smith v. Smith (1961) 366 U.S. 210.....   | 4    |

## CONSTITUTIONS

|   |        |
|---|--------|
| California Constitution, Article I, § 7, subd.(a) ..... | 1      |
| California Constitution, Article X, § 4.....            | 11     |
| United States Constitution                              |        |
| Article I, § 10, cl. 1.....                             | 10, 11 |
| Fifth Amendment.....                                    | 11     |
| Fourteenth Amendment.....                               | 6, 11  |

## STATUTES

|  |    |
|--|----|
| Cal. Pub. Resources Code, § 30000 et seq.....      | 2  |
| § 30001.5 .....                                    | 11 |
| § 30210 .....                                      | 11 |
| 28 United States Code section 1257(2) and (3)..... | 2  |

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The California Coastal Commission, appellee, respectfully moves this honorable Court to dismiss the appeal now pending, or in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division 4, on the following grounds:

A. The decision of the Court of Appeal rests upon an independent state ground, namely the Equal Protection Clause of the California Constitution. (Cal. Const., art. I, § 7, subd. (a).)

B. The questions upon which the decision in the cause depends are unsubstantial and do not require further argument. The issue of freedom of association has previously been considered by this Court in *New York State Club Assn., Inc. v. City of New York* (June 20, 1988) \_\_\_ U.S. \_\_\_, 56 U.S.L.W. 4653; *Board of Directors of Rotary International v. Rotary Club of Duarte* (May 4, 1987) \_\_\_ U.S. \_\_\_, 107 S.Ct. 1940; and *Roberts v. United States Jaycees* (1984) 468 U.S. 609. The issues regarding the existence of state action have previously been considered in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, and *Gilmore v. City of Montgomery* (1974) 417 U.S. 556.

C. Several of the "questions presented" in the Jurisdictional Statement were not posed, presented, or decided by the court below.

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### STATEMENT OF THE CASE

Appellant Jonathan Club invokes the jurisdiction of this Court under title 28 United States Code section 1257(2) and (3).

The Court of Appeal decision arose in the following way: The Jonathan Club obtained a coastal development permit from the California Coastal Commission pursuant to the California Coastal Act of 1972 (Cal. Pub. Resources Code, § 30,000 et seq.). That decision included a condition to which the Jonathan Club objected. The Club sought judicial review of the Coastal Commission decision in the California Superior Court, which upheld the decision of the Commission. The Superior Court judgment was

affirmed by the Court of Appeal. (Jurisdictional Statement, p. A-2.) The California Supreme Court declined to hear the case. (Jurisdictional Statement, p. B-1.)

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### STATEMENT OF FACTS

The Jonathan Club, the State of California, and the City of Santa Monica engaged in lengthy and complex litigation concerning the boundary between public and private property. Ultimately the litigation was settled, and pursuant to the settlement the Jonathan Club obtained a lease giving it exclusive use of four parcels of state-owned land bordering on property owned by the Club. (Jurisdictional Statement, p. A-3.)

In 1985 the Jonathan Club filed an application with the California Coastal Commission for a coastal development permit. It proposed a major remodeling and expansion of its beach facility. It involves 122,000 square feet of land, 58,000 square feet of which is leased public property. The proposed development includes expanding further seaward onto both leased and fee-owned sandy beach, and incorporating parking spaces from leased public land which previously had been used for parking by both the Jonathan Club members and the public. The four public parcels were to be used chiefly for parking and paddle tennis courts. (Jurisdictional Statement, pp. A-3, A-4.)

The Commission's staff recommended approval of the project, subject to certain conditions to which the Jonathan Club did not object. At the public hearing on



the Jonathan Club's application, the Commission itself adopted an additional condition which states:

"Prior to transmittal of a permit, the Jonathan Club shall deliver to the Executive Director [of the Coastal Commission] a statement that the Club will not discriminate on the basis of race, sex, or religion. The certification of membership policy shall remain in effect during the life of this project." (Jurisdictional Statement, pp. A-3 through A-6.)

It was the validity of this condition which was litigated in the California courts. The condition was found to be valid by those courts, and it is the decision of the Court of Appeal upholding the condition which the Jonathan Club seeks to have reviewed by this Court.

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## ARGUMENT

### I

#### THE DECISION OF THE COURT BELOW RESTS UPON AN INDEPENDENT STATE GROUND

Appeals from state court judgments are subject to dismissal when they are based upon adequate nonfederal grounds. (*Smith v. Smith* (1961) 366 U.S. 210.)

In this case the principle question was whether there was sufficient "state action" to justify the requirement that a private club comply with nondiscrimination requirements. Many of the arguments revolved around interpretation of decisions from this Court dealing with interpretation of the Equal Protection Clause of the



United States Constitution. In addition, however, the Court of Appeal considered the Equal Protection Clause of the Constitution of California. The opinion states:

"The Commission also maintains that state action is present under the equal protection clause of the state Constitution. (Cal. Const., art. I, § 7, Subd.(a).) We agree. While the state and federal equal protection safeguards are substantially equivalent (*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596, fn. 11), and state action is necessary under both (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 468), state action may exist under the state provision where it is not recognized under the federal. '[A]lthough our court will carefully consider federal state action decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards of our state equal protection clause. As article 1, section 24 of the California Constitution explicitly declares: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." ' (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, *supra*, at p. 469; *Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 220.)

"Past decisions in this state which have construed the 'separate and distinct' state equal protection safeguard have recognized 'the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today.' (*Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 284-285; *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 301-302.) The condition imposed by the Commission here was aimed at those realities.

"The preceding state action analysis convinces us that state action has been established in this case

under the state Constitution as well as the federal Constitution." (Jurisdictional Statement, pp. A-15 through A-16; fn. omitted.)

This holding is clear and unequivocal. The decision below rests upon an independent state ground.

## II

### THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND DO NOT WARRANT FURTHER ARGUMENT BEFORE THIS COURT

#### A. The "State Action" Issue Was Decided On The Basis Of Well-Established Law

This Court has previously established the rules for determining when there is sufficient state action involved to invoke the Equal Protection Clause of the Fourteenth Amendment and to require compliance with its strictures by a private entity. Cases involving the issue include *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, and *Gilmore v. City of Montgomery* (1974) 417 U.S. 556. These cases set forth the principles of law to be applied, and the California Court of Appeal considered those cases in depth in its opinion. (Jurisdictional Statement, pp. A-7 through A-15.) While the Jonathan Club disagrees with the conclusions reached by the California Court of Appeal, further review by this Court is simply not warranted when the most that would be accomplished would be a further refinement of where the particular facts of this case fall on the continuum between *Burton* and *Moose Lodge No. 107*.

The Jonathan Club claims the decision of the California Court of Appeal is "directly contradictory" to the decision in *Golden v. Biscayne Bay Yacht Club* (5th Cir. 1976) 530 F.2d 16, cert. denied, (1976) 429 U.S. 872. The California Court of Appeal considered and carefully distinguished that case. It noted that a critical distinguishing factor was that in the present case, unlike *Golden*, the public would be excluded from needed, otherwise usable public beach by the Jonathan Club. It also noted that while *Golden* involved a nominal rent of one dollar per year, the lease to the Jonathan Club involved payment of over \$40,000 per year. (Jurisdictional Statement, pp. A-14 and A-15.) The significance of the exclusion of the public derives from the fact the Jonathan Club property is immediately adjacent to the most heavily used beach in the State of California. The leased property will be used exclusively by Jonathan Club members during the term of the lease. (Jurisdictional Statement, p. A-14.)

It should also be noted that the first "question presented" in the Jurisdictional Statement is "... does a private party's lease of public lands, *without more*, create 'state action'..." (Emphasis added.) Indeed, this premise underlies the Jonathan Club's argument on the state action issue. In this regard, the Club ignores the statement by the Court of Appeal when a similar attack was made upon the trial court decision. The Court of Appeal stated:

"The Club incorrectly maintains that the trial court relied solely upon the factor of the lease instead of looking at the total circumstances. In fact, the trial court made the following findings. . . ." (Jurisdictional Statement, pp. A-13, A-14.)

After stating the findings, the Court explained why more than the mere existence of the lease was involved.

**B. The "Freedom Of Association" Issue Breaks No New Ground**

In addition to denying the existence of state action, the Jonathan Club argues that it has been deprived of its right to freedom of association and related rights. These issues have been considered by this Court in the recent cases of *New York State Club Assn., Inc. v. City of New York* (June 20, 1988) \_\_\_ U.S. \_\_\_, 56 U.S.L.W. 4653; *Board of Directors of Rotary International v. Rotary Club of Duarte* (May 4, 1987) \_\_\_ U.S. \_\_\_, 107 S.Ct. 1940; *Roberts v. United States Jaycees* (1984) 468 U.S. 609. Each of those cases establishes that associational rights of large organizations must give way when balanced against compelling state interests in terminating invidious discrimination. No new ground would be broken by again considering this issue in the context of the present case. At best it would require this Court to apply the previously enunciated rules to the unique facts of this case. Moreover, the California Court of Appeal found that the record did not contain sufficient details to perform such an analysis, and did not approach the case on that basis. (Jurisdictional Statement, p. A-17.)

**C. There Is No Substantial Issue Of Due Process**

The Jonathan Club strenuously argues that it was deprived of procedural due process of law, and in connection with that argument repeatedly asserts that there was no showing that the Club in fact engaged in

invidious discrimination. The Jonathan Club does not mention the reason why there was no evidence on this issue. However, it was succinctly stated by the Court of Appeal:

"When queried, representatives of the Club repeatedly refused to state whether or not the Club had discriminatory membership policies, on the ground that issue was not before the Commission." (Jurisdictional Statement, p. A-5.)

The Court further stated:

"All the Commission knew about the Club was that it owned and operated a facility at Santa Monica State Beach, proposed a development which included a sizeable block of leased state land, was reputed to practice discriminatory membership policies, and refused to discuss the issue." (Jurisdictional Statement, p. A-17.)

Having refused to supply any information, while it nevertheless insisted upon its rights to utilize state property, the Jonathan Club is hardly in a position to complain of the absence of evidence concerning discrimination. The court below made it clear that its decision rested upon a finding of state action which entitled the state to condition its permit to assure there would be no invidious discrimination by an organization which obtained a long-term lease of public property to use exclusively for its membership. The involvement of the state justifies the condition. The state may prevent discrimination, not merely terminate it after it occurs.

## III

**THE JONATHAN CLUB IS NOT ENTITLED  
TO RAISE ISSUES WHICH WERE NOT PRE-  
SENTED BELOW**

For this Court to have jurisdiction, a federal question must have been both raised and decided in the state court below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.) It must also appear from the record that the decision of the federal question was necessary to the determination of the cause and actually decided. (*Lynch v. New York* (1934) 293 U.S. 52, 54.)

This rule is applicable to several of the questions presented in the Jurisdictional Statement. To begin with, question 4 is whether the State of California has violated the Contract Clause of the United States Constitution (U.S. Constitution Article I, § 10, cl. 1) by unilaterally modifying a contract. (Jurisdictional Statement, p. ii.) The Contract Clause was nowhere raised or discussed in the courts below. There is nothing in the opinion of Court of Appeal dealing with the Contract Clause. Of course, one reason for this is that there was no breach of the lease or any modification which was impermissible. Rather, the Court held:

"We find that, just as in *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. at page 725, the fact that the initial lease with the state lacked a non-discrimination condition did not preclude subsequent imposition of such a condition when the omission was belatedly recognized." (Jurisdictional Statement, p. A-23.)

Obviously, where there has been no improper modification of a contract, the Contract Clause of the United States Constitution is not an issue.

The Jonathan Club also argues that the procedures authorized by California Public Resources Code sections 30001.5 and 30210 as well as California Constitution, article X, section 4 are unconstitutional under the Fifth and Fourteenth Amendments. In addition, the Jonathan Club raises the issue of whether those same sections, as applied to Jonathan Club, are "unconstitutional and/or void for vagueness under the First Amendment." (Jurisdictional Statement, p. i.)

These issues are not discussed in the Court of Appeal decision because they were not raised. The first reference to any possibility that a state statute is void for vagueness comes in the Jurisdictional Statement.

The Jonathan Club attempts to make the questions presented to this Court rise to the level of constitutional violations. In fact, the case below revolved around the single issue of whether the Coastal Commission was authorized to impose the nondiscrimination condition. That is the issue dealt with by the court below, and correctly decided. The remaining issues are variations on the same theme, but were not properly raised below or decided by the California courts.

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## CONCLUSION

The California Coastal Commission imposed a non-discrimination condition upon Jonathan Club in connection with approval of a coastal development permit. That condition assured that all segments of the public would have the equal opportunity to become members of the Club while the Club had exclusive use of land leased from the state from which the general public would be excluded. In imposing the condition the California Coastal Commission complied with decisions of this Court which obligate government to avoid placing a state's "power, property and prestige" behind invidious discrimination by a private entity. Where the entity refused to give any assurance that it would not engage in such discrimination, the state was entitled – under both the state and federal Constitutions – to insure nondiscrimination.

This decision did not deprive the Jonathan Club of any right – whether involving property, freedom of association, or otherwise.

The present case simply presents one more instance of a court defining and refining the limits of private and state action, and striking a balance between a government interest in terminating invidious discrimination and a private interest in being free from government restraint. This Court has already enunciated the principles applicable to such disputes, and there is no appropriate basis for further review of the present case.

The appeal should be dismissed, or, alternatively, the decision of the California Court of Appeal should be affirmed.

DATED: September 7, 1988.

Respectfully submitted,

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